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Brentwood Assisted Living Community and Service Employees International Union Healthcare Illinois/Indiana. Case 13–CA–46045

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND PEARCE

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 26, 2010, the General Counsel issued the complaint on June 3, 2010, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 13–RC–21864. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982)). The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.¹

On June 22, 2010, the Acting General Counsel filed a Motion for Summary Judgment. On June 24, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its objections to the election in the representation proceeding.²

¹ The Respondent's answer denies sufficient knowledge concerning the filing and service of the charge. Copies of the charge and affidavit of service thereof are attached as exhibits to the General Counsel's motion, showing the dates as alleged, and the Respondent does not challenge the authenticity of these documents. Accordingly, we find that the Respondent's denials in this regard do not raise any issue of fact warranting a hearing.

² In addition to denying that the Union was properly certified, the Respondent maintains that the Agency's processing of this case from August 14, 2009, to April 26, 2010, was undertaken without a proper quorum, and that, therefore, the processing of the petition, the conduct of the election, the investigation of the objections, the report on the Employer's objections, the conduct of the hearing, and the Hearing Officer's decision were all without legal force or effect, citing *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). We find no merit

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an assisted-living community with an office and place of business in Hobart, Indiana (the Respondent's facility), has been engaged in the business of providing assisted-living facilities and services to seniors.

During 2009, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$100,000, and purchased and received goods and services for use at its facility valued in excess of \$5000 directly from points outside the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Service Employees International Union Healthcare Illinois/Indiana, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held September 25, 2009, the Union was certified on April 26, 2010, as

in this argument. The Regional Director properly processed the underlying representation proceeding by virtue of the authority delegated to him under Sec. 3(b) of the Act. See 26 F.R. 3911 (Board's delegation of authority in representation proceedings to regional directors). Further, the April 26, 2010 Decision and Certification of Representative was issued by a three-member panel.

³ Thus, we deny the Respondent's request that the complaint be dismissed in its entirety. In addition, we deny the Respondent's request that its response to the Notice to Show Cause be considered a motion for reconsideration of the representation case. It is axiomatic that a motion for reconsideration must be filed in the proceeding in which reconsideration is sought. Further, the Board's Rules and Regulations provide that a motion for reconsideration in a representation proceeding must be filed within 14 days after service of the decision or report. Sec. 102.65(e)(1) and (2). Therefore, the Respondent's motion would be untimely even if it had been filed in the representation proceeding.

the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including assisted living resident assistants and medication technicians; special care resident assistants and medication technicians; certified nursing assistants and qualified medication assistants; housekeeping employees; activity assistants; concierges; drivers; and cooks and wait staff employees employed by the Respondent at its facility currently located at 1420 Saint Mary's Circle, Hobart, Indiana; but excluding all other employees; the Executive Director and the Business Office Director; the Directors of Resident Services, Dining Services, Maintenance, Marketing, Special Care Programs and Activities; the Housekeeping Supervisor; and all RNs; LPNs and LVNs; and all office clerical employees and guards, other professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated May 5 and 19, 2010, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about May 17, 2010, the Respondent has refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since May 17, 2010, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to

bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Brentwood Assisted Living Community, Hobart, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Service Employees International Union Healthcare Illinois/Indiana, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time service and maintenance employees, including assisted living resident assistants and medication technicians; special care resident assistants and medication technicians; certified nursing assistants and qualified medication assistants; housekeeping employees; activity assistants; concierges; drivers; and cooks and wait staff employees employed by the Respondent at its facility currently located at 1420 Saint Mary's Circle, Hobart, Indiana; but excluding all other employees; the Executive Director and the Business Office Director; the Directors of Resident Services, Dining Services, Maintenance, Marketing, Special Care Programs and Activities; the Housekeeping Supervisor; and all RNs; LPNs and LVNs; and all office clerical employees and guards, other professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hobart, Indiana, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Service Employees International Union Healthcare Illinois/Indiana, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time service and maintenance employees, including assisted living resident assistants and medication technicians; special care resident assistants and medication technicians; certified nursing assistants and qualified medication assistants; housekeeping employees; activity assistants; concierges; drivers; and cooks and wait staff employees employed by us at our facility currently located at 1420 Saint Mary's Circle, Hobart, Indiana; but excluding all other employees; the Executive Director and the Business Office Director; the Directors of Resident Services, Dining Services, Maintenance, Marketing, Special Care Programs and Activities; the Housekeeping Supervisor; and all RNs; LPNs and LVNs; and all office clerical employees and guards, other professional employees and supervisors as defined in the Act.

BRENTWOOD ASSISTED LIVING COMMUNITY

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."